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No. 92-1784

IN THE

Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit, after consideration of this Court's decision in *Cipollone v. Liggett Group, Inc.*, correctly reaffirmed its earlier holding that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 & Supp. II 1990) pre-empts state law tort claims which are based upon an alleged failure to warn.

2. Whether there is any sufficient reason for this Court to review the Tenth Circuit's determination under Colorado law that Petitioner's state law property damage claims arose no earlier than 1985 and are governed by FIFRA as it existed at such time.

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RESPONDENTS' BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc. respectfully request that this Court deny Arkansas-Platte & Gulf Partnership's petition for writ of certiorari (the "Petition") and not disturb the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, *see* Pet. App. 7a, is reported at 748 F. Supp. 1474 (D. Colo. 1990). The original opinion of the United States Court of Appeals for the Tenth Circuit, *see* Pet. App. 30a, reported at 959 F.2d 158 (10th Cir. 1992), *reh'g denied*, No. 91-1085

(10th Cir. Apr. 16, 1992), *see* Pet. App. 46a, was vacated by this Court and remanded for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *See* 113 S. Ct. 314 (1992). The opinion and order on remand of the United States Court of Appeals for the Tenth Circuit, *see* Pet. App. 1a, is reported at 981 F.2d 1177 (10th Cir. 1993), *reh'g denied*, No. 91-1085 (10th Cir. Feb. 9, 1993), *see* Pet. App. 48a.

JURISDICTION

The opinion and order on remand of the United States Court of Appeals for the Tenth Circuit was entered on January 5, 1993. *See* Pet. App. 1a. A timely motion for rehearing was denied on February 9, 1993. *See* Pet. App. 48a. Respondents received the referenced Petition on May 12, 1993. By letter dated May 25, 1993 the Clerk of this Court extended the time for Respondents to file a brief in opposition to and including July 1, 1993. *See* App. at A-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), provides in pertinent part as follows:

> § 136v. *Authority of States*
>
> (a) *In general*
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) *Uniformity*
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *

§ 136(p) *Label and labeling.*

(1) *Label.*—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) *Labeling.*—The term "labeling" means all labels and all other written, printed, or graphic matter—

(a) accompanying the pesticide or device at any time; or

(b) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Department of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

* * * *

The Environmental Protection Agency has promulgated Labeling Requirements for Pesticides and Devices at 40 C.F.R. Part 156 (1992).

STATEMENT OF THE CASE

This is a product liability action involving the pesticide pentachlorophenol ("penta"), which is regulated by FIFRA. Petitioner, Arkansas-Platte & Gulf Partnership ("Petitioner"), filed its Complaint on or about September 1, 1989 against The Dow Chemical Company ("Dow")[1] and Van Waters & Rogers Inc. ("VW&R")[2] (hereinafter collectively referred to as "Respondents"), alleged manufacturers and/or distributors of the subject penta.

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[1]The parent companies and subsidiaries (except wholly owned subsidiaries) of The Dow Chemical Company are as follows: Marion Merrell Dow Inc., and Destec Energy, Inc.

[2]Van Waters & Rogers Inc. has no wholly owned subsidiaries. Univar Corporation is the parent company of Van Waters & Rogers Inc.

The Complaint alleges that certain property, presently owned by Petitioner, became contaminated by penta utilized from 1960 to 1972 in a wood treatment operation conducted by a previous owner of the property. Petitioner did not own the subject property until June 20, 1985, and asserts that its claim arose, at the earliest, in 1987. The Complaint contains claims premised upon state law theories of negligence and strict liability, both of which are based wholly on an alleged failure to warn regarding the consequences of using penta.

Respondent Dow moved for summary judgment, and was joined by Respondent VW&R, on grounds that FIFRA pre-empted the state law failure to warn claims asserted by Petitioner. The United States District Court for the District of Colorado denied Respondents' Motion by Order dated October 22, 1990. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474 (D. Colo. 1990). By subsequent Order of January 22, 1991, that court amended its ruling to certify the issue for appeal pursuant to 28 U.S.C. § 1292(b) (1988). *See* Pet. App. at 28a.

Respondents then petitioned the United States Court of Appeals for the Tenth Circuit for leave to appeal the trial court's denial of summary judgment. The Tenth Circuit granted Respondents' petition to appeal on February 26, 1991. *See* Pet. App. 29a. After briefing and oral argument, the Tenth Circuit issued its opinion of March 6, 1992, reversing the district court's denial of summary judgment to Respondents, and holding that the state law failure to warn claims asserted by Petitioner were pre-empted by FIFRA. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 959 F.2d 158 (10th Cir. 1992) (hereinafter "*Arkansas-Platte I*"); *see* Pet. App. 30a.

Petitioner filed its first petition for writ of certiorari on July 30, 1992. This Court granted the 1992 petition for a writ of certiorari, vacated the Tenth Circuit's decision in *Arkansas-Platte I* and remanded that case to the Tenth Circuit for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *See* 113 S. Ct. 314 (1992); Pet. App. 43a.

Pursuant to an Order of the Tenth Circuit dated October 19, 1992, both Petitioner and Respondents submitted briefs addressing the pre-emptive scope of FIFRA in light of this Court's *Cipollone* decision. *See* Pet. App. 44a. On January 5, 1993, the Tenth Circuit unanimously reaffirmed its previous holding that FIFRA pre-empts all state law tort actions which are premised upon an alleged failure to warn. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 981 F.2d 1177 (10th Cir. 1993) (hereinafter *"Arkansas-Platte II"*); *see* Pet. App. 1a-6a. The Tenth Circuit found that its previous holding of pre-emption in *Arkansas-Platte I* was "re-enforced" by *Cipollone* because the pre-emption language of the cigarette labeling statute at issue in *Cipollone* was similar to the language contained in FIFRA, 7 U.S.C. § 136v(b). *See* 981 F.2d at 1179; Pet. App. 4a. Petitioner subsequently filed the instant petition for writ of certiorari. *Arkansas-Platte II, petition for cert. filed*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784).

SUMMARY OF ARGUMENT

This case involves only state law tort claims based on an alleged failure to warn, and the Tenth Circuit's holdings below are so limited. *See Arkansas-Platte I*, 959 F.2d at 164; Pet. App. at 42a; *Arkansas-Platte II*, 981 F.2d at 1179; Pet. App. at 6a. The proceedings below and the Petition herein do not address, and do not affect, any other state law claims which might be asserted by Petitioner.[3]

FIFRA is federal legislation designed, inter alia, to provide a comprehensive and strictly controlled packaging and labeling

[3]During the pendency of Respondents' Motion for Summary Judgment, Petitioner filed a "Motion for Clarification" which requested the trial court to acknowledge that Petitioner had pled claims in addition to failure to warn claims. By Order dated December 13, 1990, the trial court denied Petitioner's "Motion for Clarification," thereby leaving failure to warn as the sole basis for Petitioner's state law claims of negligence and strict liability. Thereafter, Petitioner filed a Motion to Amend its Complaint to allege claims in addition to failure to warn. This Motion is still pending before the trial court.

scheme for pesticides. FIFRA's statutory and regulatory framework, as well as its legislative history, demonstrate clear congressional intent that regulation and control over the labeling of pesticides be vested solely with the United States Environmental Protection Agency ("EPA").

Congress' enactment of 7 U.S.C. § 136v(b) within FIFRA clearly evinces its intent that the states not impose "any requirements" differing from labeling requirements established by the EPA under FIFRA. A determination of inadequate warning by a jury would constitute impermissible state law regulation of pesticide labeling. The Tenth Circuit has twice properly determined that FIFRA pre-empts Petitioner's state law failure to warn claims.

A review of this Court's relevant pre-emption opinions in *Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991)*, *Cipollone,* and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992) leads inexorably to the conclusion that state law requirements regarding the labeling of FIFRA-regulated pesticides, including failure to warn tort claims, are pre-empted by FIFRA. Accordingly, there is no special or important reason why this Court should review the FIFRA pre-emption issue addressed by the Tenth Circuit.

Similarly, there is no conflict between the United States Courts of Appeals or state courts of last resort that warrants review of the FIFRA pre-emption issue. Following this Court's 1992 decision in *Cipollone*, all United States Courts of Appeals and state courts of last resort that have considered this issue have been unanimous in finding that FIFRA pre-empts state law failure to warn claims.

Additionally, there is no special or important reason why this Court should review the Tenth Circuit's determination that, under Colorado law, Petitioner's property damage claim arose (if at all) no earlier than 1985, and that such claim is governed by FIFRA as it existed at that time. The Tenth Circuit's application of FIFRA to Petitioner's claims is in accordance with long-stand-

ing decisions of this Court and does not raise an issue of retroactivity. *See, e.g., Reynolds v. United States*, 292 U.S. 443 (1934); *Cox v. Hart*, 260 U.S. 427 (1922). Petitioner's assertion that § 4(e) of the 1972 FIFRA legislation constitutes an express Congressional directive preserving third-party tort actions such as this one is a misstatement of law which Petitioner has twice urged upon the Tenth Circuit and which was properly rejected on each occasion. Section 4(e) of the 1972 legislation deals solely with effective dates of new provisions introduced by that legislation. Again, no issue is presented for review by this Court.

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S RECENT PRE-EMPTION DECISIONS; THE TENTH CIRCUIT CORRECTLY REAFFIRMED ITS EARLIER DECISION THAT PETITIONER'S STATE LAW FAILURE TO WARN CLAIMS ARE PRE-EMPTED BY FIFRA.

The 1991 decision in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), is the only decision issued by this Court to have addressed the pre-emptive scope of FIFRA. In *Mortier*, this Court reviewed the issue of whether a town ordinance that placed restrictions on the *use* of pesticides was pre-empted by FIFRA, 7 U.S.C. § 136v(a). In analyzing the scope of FIFRA pre-emption, this Court compared the congressional grant of authority to states for the regulation of pesticide *use*, 7 U.S.C. § 136v(a), with Congress' withholding of state authority to regulate pesticide *labeling* and *packaging*, 7 U.S.C. § 136v(b):

> The provision immediately following the statute's grant of regulatory authority to the States [with respect to pesticide *sale or use*] declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire

> field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling and packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.
>
> * * * *
>
> [L]ocal use permit regulations—unlike labeling or certification—do not fall within an area that FIFRA's "program" pre-empts . . . .

Mortier, 111 S. Ct. at 2486-87 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)).

Commenting on *Mortier*, the Tenth Circuit, in *Arkansas-Platte I*, noted:

> Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly pre-empted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* 111 S. Ct. at 2479, we are nevertheless inclined to adopt its construction of FIFRA.

Arkansas-Platte I, 959 F.2d at 163 (emphasis in original, footnote omitted). Following, inter alia, this reasoning in *Mortier*, the Tenth Circuit held that state law labeling and failure to warn claims are pre-empted by FIFRA. Respondents are not aware of any federal appellate court decision subsequent to *Mortier* which has held to the contrary.

The Tenth Circuit's holding, in addition to being consistent with *Mortier*, is also supported by the other recent pre-emption decisions by this Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992).

In *Cipollone*, the Court reaffirmed that "the purpose of Congress is the ultimate touchstone of pre-emption analysis." 112 S. Ct. at 2617 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Express pre-emption and implied pre-emption are both analytical mechanisms by which courts seek to determine such congressional purpose and intent. Nothing in *Cipollone* indicates that this Court intended to undermine or abrogate the traditional implied pre-emption analysis in all cases in which the statute involved contains any type of express pre-emption language. This is best illustrated by this Court's decision in *Gade*, which pre-dated *Cipollone* by only a few days.

In *Gade*, five justices found that the Occupational Safety and Health Act of 1970, 84 Stat. 1590 (the "OSH Act") and its federal regulations pre-empted a state regulation which required training for persons working with hazardous materials.[4] Although Justice Kennedy reached this conclusion on the basis of express pre-emption, Justice O'Connor's plurality opinion relied on an implied pre-emption analysis. The plurality opinion emphasized that express and implied pre-emption analyses are not "rigidly distinct" or mutually exclusive; the presence of an express pre-emption clause did not foreclose an implied pre-emption analysis:

> Justice Kennedy, while agreeing on the pre-emptive scope of the OSH Act, finds that its pre-emption is express rather than implied. The Court's previous observation that our pre-emption categories are not "rigidly distinct," *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990), is proved true by this case. We, too, are persuaded that the text of the [OSH] Act provides the strongest indication that Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue, but we cannot say that it rises to the level of express pre-emption.

Gade, 112 S. Ct. at 2386 n.2 (citations omitted in part).

[4]The OSH Act is an elaborate regulatory scheme similar to FIFRA in that both statutes are complex and supported by comprehensive regulations administered by federal governmental agencies.

Thus, consistent with *Cipollone* and *Gade*, the presence of pre-emptive language in § 136v(b) did not restrict the Tenth Circuit to only an express pre-emption analysis to reach the conclusion that FIFRA pre-empts state law failure to warn claims. The ultimate issue is congressional intent, and the Tenth Circuit's conclusion in both *Arkansas-Platte I* and *Arkansas-Platte II* that FIFRA pre-empts state law failure to warn claims was and is a correct one.[5]

II. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS OR STATE COURTS OF LAST RESORT THAT WARRANTS CERTIORARI REVIEW OF FIFRA PRE-EMPTION OF STATE LAW FAILURE TO WARN CLAIMS.

Every United States Court of Appeals and every state court of last resort which has addressed the subject of FIFRA pre-emption subsequent to this Court's decisions in *Cipollone* and

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[5]Petitioner urges that the Court below "misconstrued" *Cipollone* in its finding that "requirements" as found in 7 U.S.C. § 136v(b) includes state law damage actions. Petition at 27-28. However, Petitioner, rather than the Court of Appeals, has misconstrued *Cipollone*, the pertinent portion of which reads as follows:

> [Petitioner] argues that common-law damage actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." We disagree; such an analysis is at odds both with the plain words of the 1969 Act [Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87] and with the general understanding of common-law damage actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common-law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Cipollone, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)).

Gade has determined that state law failure to warn claims are preempted.[6]

On August 12, 1992, the Supreme Court of Nevada in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 936 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (April 26, 1993), concluded:

> First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely preempt" state authority to change federal labeling. *See, e.g.*, H.R. Rep. No. 511, 92d Cong., 2nd sess. 1-12(1972). Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by state action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the states to supplement it.

Davidson, 834 P.2d at 936.

Thereafter, on January 5, 1993, the Tenth Circuit Court of Appeals in *Arkansas-Platte II* reaffirmed its earlier holding of preemption, stating:

> After reviewing the briefs and the Court's holding, we conclude *Cipollone* does not require a conclusion different than the one we reached initially. We determined the legislative language relating to labeling contained in 7 U.S.C. § 136v(b) results in preemption, and *Cipollone* does not undercut that determination. Indeed, our conclusion is re-enforced because the labeling provision of § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims.

Arkansas-Platte II, 981 F.2d at 1178-79.

Subsequent to *Arkansas-Platte II*, the Eleventh Circuit Court of Appeals in *Papas v. Upjohn Company*, 985 F.2d 516 (11th Cir.

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[6]The federal district court and lower state court opinions cited by Petitioner do not provide a basis for granting the Petition. Sup. Ct. R. 10.1.

1993) (hereinafter "*Papas II*"), *petition for cert. filed*, 61 U.S.L.W. 3836 (U.S. June 7, 1993) (No. 92-1938), reaffirmed its earlier holding of FIFRA pre-emption, stating:

> FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone*, 505 U.S. at __, 112 S.Ct. at 2621-22. Thus the *Cipollone* opinion dictates, under an express pre-emption analysis, the same result we reached earlier under the implied pre-emption doctrine.

Papas II, 985 F.2d at 518.

Most recently, the Seventh Circuit Court of Appeals in *Shaw v. Dow Brands, Inc.*, 1993 WL 166324 (7th Cir. May 18, 1993), also found that FIFRA pre-empts state law failure to warn claims, noting:

> In order to succeed in the wake of *Cipollone*, then, Shaw would have to show that FIFRA's pre-emption language is less sweeping than the language of the 1969 Cigarette Act. Yet we can discern no significant distinction at all—FIFRA says that "[s]uch State shall not impose . . . any requirements for labeling or packaging in addition to or different from those required . . . ," while the cigarette law says "[n]o requirement[s] or prohibition[s] . . . imposed under State law" shall be permitted. Both seem equally emphatic: "[n]o requirements or prohibitions" is just another way of saying a "[s]tate shall not impose . . . any requirements." Not even the most dedicated hair-splitter could distinguish these statements. If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA.

Shaw, 1993 WL 166324 at *6.

Davidson, Arkansas-Platte II, Papas II and *Shaw* comprise all of the federal courts of appeals and state courts of last resort

which have addressed the FIFRA pre-emption issue after *Cipollone* and *Gade*.[7] All of these decisions are uniform in holding that FIFRA pre-empts state law failure to warn claims. Accordingly, there is no conflict which would justify granting the petition for writ of certiorari.

III. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE DOES NOT RAISE AN ISSUE AS TO RETROACTIVE STATUTORY APPLICATION, IS CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, INCLUDING *CIPOLLONE*, AND, AS A MATTER OF STATE LAW INTERPRETATION, HAS NO NATIONAL SIGNIFICANCE.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE VERSION OF FIFRA TO BE APPLIED WAS AN ISSUE OF STATE LAW INTERPRETATION AND THAT RETROACTIVITY WAS NOT AN ISSUE IN THIS CASE.

Petitioner contends that the pre-1972 version of FIFRA should apply to the facts of this case even though it has asserted claims for relief based upon post-1972 Colorado law[8] and even though the Tenth Circuit has twice determined that Petitioner's Colorado state law property damage claims arose no earlier than 1985.

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[7]The only federal court of appeals decision and the only decision by a state court of last resort which have held that FIFRA does not pre-empt state law failure to warn claims pre-date *Cipollone* and *Gade*. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992). Accordingly, these cases do not present a basis to grant the Petition. In any event, *Ferebee* and *Alter* rely upon an analysis which was severely criticized even prior to *Cipollone* and *Gade*. In addition, these cases are contrary to the *Mortier* decision, which was handed down subsequent to *Ferebee* and which the court in *Alter* did not address.

[8]For example, Petitioner's failure to warn claim is based in part on strict liability, a cause of action that was not adopted by the Supreme Court of Colorado until 1975. *See Hiigel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1975).

See Petition at 13. The Tenth Circuit's application of the current codification of FIFRA to Petitioner's claims does not represent a retroactive application of FIFRA. As the Tenth Circuit correctly recognized in *Arkansas-Platte I*:

> The issue here, however, does not concern retroactivity, but rather when the plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989.

959 F.2d at 160; Pet. App. 35a. In *Arkansas-Platte II*, the Tenth Circuit properly reaffirmed its earlier decision in this regard:

> Plaintiff has always, but unsuccessfully, argued the law in effect in 1987, the year in which contamination was discovered, does not apply to its claims against defendants . . . we resolved [that issue in *Arkansas-Platte I*] in favor of defendants by holding the claim did not arise until after the 1972 amendment of FIFRA . . . we held plaintiff's claim did not exist until it acquired the contaminated property [in 1985].

981 F.2d at 1178; Pet. App. 3a.

Petitioner is wrong when it asserts that the Tenth Circuit refused to reconsider, in light of this Court's *Cipollone* decision, its holding in *Arkansas-Platte I*. *See* Petition at 9, 19. To the contrary, the Tenth Circuit devoted almost half of its *Arkansas-Platte II* opinion to Petitioner's so-called "choice of law" issue.[9] *See* 981 F.2d at 1178; Pet. App. 2a-4a. After careful analysis of the Petitioner's and Respondents' briefs on the applicability of *Cipollone*, the Tenth Circuit concluded that the "only issue this case has in common with *Cipollone* is the issue of preemption." 981 F.2d at

[9]Application of the post-1972 version of FIFRA to the facts in this case is neither a "choice of law" issue as described by Petitioner in the instant Petition, nor a "retroactivity" issue as described by Petitioner in its previous briefs. Rather, the application of the post-1972 version of FIFRA to the facts of this case is required, as a matter of state law, because Petitioner has asserted state law claims that arose no earlier than 1985 when it acquired the property.

1178; Pet. App. 4a. The Tenth Circuit correctly recognized that there was:

> [N]o indication in *Cipollone* that a question was ever raised, let alone decided, about when the plaintiff's claim arose in that case. Thus, not only is the timing and nature of Mrs. Cipollone's claim different from that of the plaintiff in this case, but also her case reflects no holding of the Supreme Court about the ripening of that claim.

981 F.2d at 1178; Pet. App. 4a. This holding is consistent with this Court's comments in *Cipollone*:

> [W]e must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition ... imposed under State law with respect to ... advertising or promotion," ... We consider each category of damages actions in turn. In doing so, *we express no opinion on whether these actions are viable claims as a matter of state law; we assume arguendo that they are.*

112 S. Ct. at 2621 (emphasis added).

The point in time at which Petitioner's failure to warn claims arose is a matter of state law interpretation. The Tenth Circuit, having jurisdiction over Petitioner's claims based upon diversity of citizenship, was bound to apply Colorado law in its determination that Petitioner's claims arose no earlier than 1985 and the law in effect at that time applied to such claims. *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no reason to review the Tenth Circuit's decision in this regard. The issue is limited to the interpretation of Colorado law as it pertains to the date of accrual of a state law property damage claim and is of no national significance.[10]

[10]Moreover, Petitioner's arguments are without merit because application of pre-1972 FIFRA would not change the Tenth Circuit's con-

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B. PETITIONER HAS MISINTERPRETED AND MISAPPLIED § 4(e) OF THE 1972 LEGISLATIVE DIRECTIVE.

Most egregious, among all of Petitioner's arguments, is its contention that § 4(e) of the 1972 legislation[11] constitutes a congressional directive that the legislation have prospective application only. *See* Petition at 13. Petitioner's analysis of the statute is patently incorrect and taken wholly out of context. Section 4(e) must be read in the context of the remainder of § 4, particularly § 4(c) and § 4(d).[12] The express congressional purpose of § 4 was

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clusion that state law failure to warn claims are pre-empted. This Court has previously noted that as first enacted in 1947, FIFRA was primarily a licensing and labeling statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Although the 1972 amendments provided substantial changes governing the use of pesticides (*see, e.g.*, 7 U.S.C. § 136b and § 136c), there were few significant changes in the labeling scheme imposed by the pre-1972 version of the Act. *See generally Ruckelshaus*, 467 U.S. at 991-92 (recognizing the congressional intent that "[t]he [1972] amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute"). The regulation of and restrictions upon manufacturers' labels was very stringent under both the pre-1972 law and the post-1972 law. *See Ruckelshaus*, 467 U.S. at 991 (specifically noting that § 2(u)(2) and § 3(a)(3) of the 1947 Act set forth the types of information necessary for proper labeling of a registered pesticide including warnings to prevent harm to people, animals, and plants).

None of the four cases cited by Petitioner for the proposition that FIFRA did not pre-empt state tort law warning claims prior to the 1972 amendments actually supports that proposition. *See In re "Agent Orange" Product Liab. Litig.*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (noting in dicta that FIFRA does not displace the entire body of state product liability laws, a proposition which Respondents concede); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (specifically noting that the pre-emption issue was not argued); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969) (addressing regulatory compliance as a defense, but not addressing pre-emption directly); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Texas App. 1968) (not raising the issue of pre-emption).

[11]Pub. L. No. 92-516.

[12]Sections 4(c) and 4(d) describe the new programs and other statutory modifications enacted by the 1972 legislation. For example, the

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only to make new criminal and civil penalties and liabilities to third persons established by the 1972 amendments "effective gradually over a four-year period because of its complexity and problems involved . . . ." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4060. To construe § 4(e) as somehow pertaining to state common-law tort claims is to take that portion of the legislative directive wholly out of context and is inconsistent with the plain language of § 4 when read in its entirety.[13]

The Tenth Circuit's application of the post-1972 codification of FIFRA necessarily results from the undisputed determination, as a matter of Colorado law, that Petitioner's state law property damage claims, if any, could not have arisen earlier than 1985. There is no special or important reason for this Court to review the Tenth Circuit's decision. Petitioner's request for certiorari review or, alternatively, for remand of this case, should be denied.

(Footnote continued from previous page)

1972 Act created both criminal and civil penalties and liabilities to third persons. *See, e.g.*, 7 U.S.C. § 136l (criminal and civil penalties) and 7 U.S.C. § 136m (liability to third party purchasers of pesticides who suffer loss as a result of a registration suspension or cancellation). Section 4(e), when read in context with the other provisions of § 4, simply indicates that, for example, the criminal and civil liabilities created by FIFRA, even though part of the October 21, 1972 enactment, would not become effective until the expiration of the time period specified in § 4.

[13]Both U.S.C.A. and U.S.C.S. annotators agree:

> Effective date. [referring to indemnity section, 7 U.S.C. § 136m] Section effective at the close of October 21, 1972, except if regulations are necessary for the implementation of any provision that becomes effective on October 21, 1972, and continuation in effect of the provisions of subchapter I of this chapter and regulations thereunder as in effect prior to October 21, 1972, until superseded by provisions of Pub. L. 92-516 and regulations thereunder, see section 4 of Pub. L. 92-516, set out as a note under section 136 of this title.

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CONCLUSION

The Tenth Circuit, after careful consideration of this Court's decision in *Cipollone*, correctly reaffirmed its earlier holding that FIFRA pre-empts state law tort claims based upon an alleged failure to warn. All other federal appellate courts and state courts of last resort that have addressed this FIFRA pre-emption issue after *Cipollone* and *Gade* are uniform in holding that FIFRA pre-empts state law failure to warn claims. Therefore, there is no conflict nor any special or important reason for this Court to grant certiorari on the FIFRA preemption issue.

There also is no sufficient reason for this Court to review the Tenth Circuit's determination, under Colorado law, that Petitioner's state law property damage claims arose no earlier than 1985 and are governed by FIFRA as it existed at that time. This determination is a matter of state law interpretation with no national significance.

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7 U.S.C.A. § 136m (Historical Note). Also:

> Effective date of section: [referring to indemnity section, 7 U.S.C. § 136m] For effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 U.S.C.S. § 136 note.

7 U.S.C.S. § 136m (History; Ancillary Laws and directives). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 n.4 (1990) ("Congress may delay the effective date of a statute for many reasons having nothing to do with retroactivity, particularly if the statute is complex.") (White, J., dissenting).

Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
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May 25, 1993

C. Michael Montgomery
MONTGOMERY, GREEN, JARVIS, et al.
1050 Seventeenth Street
Suite 2300
Denver, CO 80265

Re: Arkansas-Platte and Gulf Partnership
v. The Dow Chemical Company and Van Waters
& Rogers, Inc.
No. 92-1784

Dear Mr. Montgomery:

Your request of May 24, 1993 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including July 1, 1993.

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/

Francis J. Lorson
Chief Deputy Clerk

cc: Richard R. Young